

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

VIRGINIA MASON HOSPITAL, (a division of  
Virginia Mason Medical Center),

Employer,

and

WASHINGTON STATE NURSES  
ASSOCIATION,

Union.

Case 19-CA-30154

VIRGINIA MASON HOSPITAL'S  
ANSWERING BRIEF TO  
WASHINGTON STATE NURSES  
ASSOCIATION'S AND  
GENERAL COUNSEL'S  
EXCEPTIONS TO THE DECISION  
OF THE ALJ

**I. INTRODUCTION**

The Administrative Law Judge correctly ruled that Virginia Mason Hospital was authorized to enhance its Infection Control Policy and that the Union waived its right to bargain over the change when it agreed to the language in the management rights clause in the Collective Bargaining Agreement.

Virginia Mason, an acute care hospital serving primarily elderly patients, identified a serious risk to patients from influenza spread by its own care givers. To combat the threat of nurses communicating the virus to vulnerable patients, Virginia Mason has required nurses either to wear face masks or to take antiviral medication during flu season if they refuse to be immunized against the flu.

Virginia Mason enacted the face mask option pursuant to contractual rights enumerated in the management rights clause of the Collective Bargaining Agreement. The Union granted Virginia Mason sole discretion to determine what equipment nurses shall use, and how and when they shall use it. The Union granted Virginia Mason sole discretion to promulgate rules, to improve procedures, to direct nurses, and to enforce policies with discipline. These provisions, read together, specifically authorized Virginia Mason to unilaterally enhance the protective equipment component of its Infection Control Policy.

## II. FACTUAL BACKGROUND

Virginia Mason is an acute care hospital in Seattle, Washington, providing health care to seriously ill and vulnerable patients. Most of its patients are elderly and, therefore, particularly susceptible to contracting influenza due to their compromised immune systems. (Tr. 144). Many hospitalized patients are vulnerable to infectious diseases and contract illnesses transmitted by health care workers, including registered nurses. (Tr. 137-38).

### A. The CBA Vests Virginia Mason with the Right to Take Unilateral Action.

In Section 3.3 of the Collective Bargaining Agreement (“CBA”) (G.C. Ex. 22), the Union agreed that “patient care is the first priority of the Hospital.” To further this goal, Virginia Mason negotiated and obtained in Section 18.1 the unilateral right, inter alia, “to direct nurses . . . to determine the materials and equipment to be used . . . to promulgate rules . . . to implement improved operational methods and procedures . . . [and] to discipline, demote, or discharge nurses.” The management rights clause furthermore instructs that “[a]ll matters not covered by the language of this Agreement shall be administered by the Hospital on a unilateral basis in accordance with such policies and procedures as it from time to time shall determine.” The Union also agreed to an expansive zipper clause in Section 20.4, in which it “unqualifiedly waive[d] the right . . . to bargain collectively with respect to *any subject or matter not*

*specifically discussed during negotiations* or covered in this Agreement.” (Emphasis added).

Section 20.3 renders past practices nonbinding.

**B. Virginia Mason’s Immunization Requirement Applies to All Employees Except Nurses.**

Because the Hospital identified a serious risk of illness and death to elderly patients from exposure to employees carrying influenza, Virginia Mason decided in 2004 to consider modifying its Fitness for Duty policy to require immunization of its entire workforce, including registered nurses and physicians, unless accommodated based on disability or religious belief. (Tr. 146:13-22). The parties discussed the proposed mandatory immunization policy several times in the Fall of 2004. (Tr. 260, Gen. Ex. 23 at page 21). The immunization requirement was deferred one year due to a vaccine shortage, and the parties agreed to a new CBA without addressing the immunization policy. That same year, Mayo Clinic vaccine expert Dr. Greg Poland visited Virginia Mason and offered his congratulations and full support for leading the way in mandating influenza immunization among health care providers. (Tr. 147-148 and 259-260).<sup>1</sup>

The Union in 2005 processed a grievance to arbitration protesting the mandatory immunization requirement. After an arbitrator ruled in favor of the Union, the Hospital complied with the arbitrator’s decision and did not require nurses to abide by the immunization requirement of the Fitness for Duty policy, which remained in effect for all other employees.

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<sup>1</sup> Counsel for the General Counsel argues that Virginia Mason Senior Vice President and Chief Nursing Officer Charlene Tachibana “admitted” that Dr. Poland considered the mandatory immunization policy “unprecedented in the nation.” (G.C. Brief in Support of Exceptions, at page 6 n.13). To the extent Counsel for the General Counsel suggests that Dr. Poland disapproved of the policy, the record reflects only his complete support and enthusiasm for Virginia Mason’s effort to combat influenza transmission. (Tr. 147:15-148:1; 259:19-260:4).

**C. Virginia Mason’s Pre-existing Infection Control Policy Required the Use of Protective Equipment, Including Face Masks.**

Hospitals are required to implement infection control policies. (Tr. 139). It is undisputed that no component of Virginia Mason’s Infection Control Policy has ever been the subject of collective bargaining during the 30 years leading up to this case. (Tr. 142:12-15). The pre-existing Policy manual outlined requirements for the use of protective equipment such as face masks, gloves, and eye shields; moreover, it differentiated such protective equipment from uniforms, which are “not considered to be personal protective equipment.” (Res. Ex. 3 at 7.2, “Personal Protective Equipment”). As written, the old Policy focused on protecting care givers from patients with known or suspected infections.<sup>2</sup> But it failed to provide reciprocal protection for patients from pre-symptomatic or asymptomatic yet contagious care givers or from care givers who worked in spite their symptoms. Thus, a coverage gap endangered patients, placing them at risk of contracting nosocomial infections transmitted by potential carriers of an entirely preventable virus.<sup>3</sup> (Tr. 136:23-24; 137-138).

**D. Virginia Mason Modified the Face Mask Component of its Infection Control Policy.**

In December 2005, the Hospital supplemented its Infection Control Policy to fill the patient protection gap. Under the modified policy, non-immunized employees, such as nurses who had declined immunization and non-unit employees who were eligible for religious or medical accommodations to the immunization requirement, were required either to take anti-viral medication or to use face masks. The updated Policy also urged Hospital visitors to wear

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<sup>2</sup> The CDC minimum guidelines repeatedly cited by Counsel for the General Counsel likewise serve only to protect care givers from infected patients. (G.C. Brief in Support of Exceptions, at page 6 n.11). The focus of Virginia Mason’s Infection Control Policy is to protect patients from infected care givers.

<sup>3</sup> Nosocomial infections are those infections transmitted to patients from within the hospital. (Tr. 137).

face masks. The updated Policy impacts just 1.5% of Virginia Mason’s employees and vendors, as 98.5% of all employees, including nurses, obtain influenza immunization. (Tr. 178-179). In the last six years, dozens of medical facilities in thirty-five states have implemented identical policies, including other hospitals in the Seattle area.<sup>4</sup>

### III. ARGUMENT

Virginia Mason modified its Infection Control Policy pursuant to exclusive management rights enumerated in Section 18.1 of the CBA. The Union agreed that Virginia Mason had unilateral authority “to direct nurses . . . to determine the materials and equipment to be used . . . to promulgate rules . . . to implement improved operational methods and procedures . . . [and] to discipline, demote, or discharge nurses.” A face mask is “equipment to be used” by registered nurses. (Tr. 141). Read together, the Union clearly and unmistakably vested Virginia Mason with the right to modify the Infection Control Policy’s protective equipment component without bargaining. The ALJ’s Supplementary Decision should be upheld on this basis alone. The Union’s agreement that past practices shall be nonbinding and that matters *not* discussed during bargaining shall be administered by Virginia Mason on a unilateral basis alternatively evidences waiver of bargaining over the revised Infection Control Policy.

#### A. The Union Waived Bargaining over Changes to the Infection Control Policy’s Equipment Component.

Management rights clauses authorize specific unilateral actions when the plain language demonstrates clear and unmistakable union waiver of bargaining. *Provena St. Joseph Medical Center*, 350 NLRB 808, 811, 815 (2007).<sup>5</sup> While provisions are interpreted according to their

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<sup>4</sup> See <http://www.immunize.org/honor-roll/influenza-mandates.asp>.

<sup>5</sup> Certain federal courts continue to follow the contract-coverage test rather than the clear and unmistakable waiver test. See *e.g.*, *Southern Nuclear Operating Co. v. NLRB*, 524 F.3d 1350

plain meaning, the Board in *Provena* found that clear and unmistakable waiver may be inferred when various provisions are read in combination with one another. 350 NLRB 808. When combined, the provisions create an “umbrella” under which unilateral action is proper. *Spartan Aviation Industries*, 17-CA-24965, 2011 WL 2412622, at 12 (NLRB Div. of Judges) (June 9, 2011).

**1. Under *Provena*, provisions in the management rights clause collectively imply contractual waiver of bargaining.**

In *Provena*, the Board relied on three provisions “taken together” in the management rights clause to uphold the employer’s unilateral revision of its disciplinary policy on attendance and tardiness. 350 NLRB at 809, 815. *Provena* unilaterally implemented the policy in 1997 and revised it in 1998. *Id.* at 809 n.11. During negotiations leading to a new collective bargaining agreement effective from 1999 through 2002, the parties “did not fully discuss” the attendance and tardiness policy. *Id.* at 810. No express provision in the collective bargaining agreement other than the management rights clause related to disciplinary processes for attendance and tardiness. *Id.* When *Provena* unilaterally rescinded and implemented a new attendance and tardiness policy in 2001, the Union challenged the new policy. *Id.* at 809-10. The Administrative Law Judge concluded that the management rights clause lacked sufficient specificity to constitute waiver. *Id.* at 815. The Board disagreed.

Applying the clear and unmistakable waiver test, the Board identified in the management rights clause “explicit” authorization for *Provena*’s unilateral action. *Id.* The clause granted *Provena* the following exclusive rights:

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(D.C. Cir. 2008); *NLRB v. Postal Service*, 8 F.3d 832 (D.C. Cir. 1993); *Chicago Tribune Co. v. NLRB*, 974 F.2d 832 (7<sup>th</sup> Cir. 1992); *see also, Provena*, 350 NLRB at 818 (“I adopt the contract-coverage analysis applied by these court opinions because they are the better approach”) (Battista, Chairman, dissenting).

- To change reporting practices and procedures and/or introduce new or improved ones;
- To make and enforce rules of conduct; and
- To suspend, discipline, and discharge employees.

*Id.* According to the Board, “[b]y agreeing to that *combination* of provisions, the Union *relinquished its right to demand bargaining* over the implementation of a policy prescribing attendance requirements and the consequences for failing to adhere to these requirements. . . . [T]he contract itself plainly speaks to the right of the Respondent to act.” *Id.* at 815-16 (emphasis added). Thus for the management rights clause to substantiate waiver, provisions need not refer to a particular policy by name; collectively, the provisions establish the parties’ “mutual intent to permit unilateral employer action with respect to a particular employment term.” *Id.* at 811.

**2. Management Rights provisions combine to create an “umbrella” under which unilateral employer action is authorized.**

Administrative Law Judge Gerald Etchingham, in *Spartan Aviation*, found it “telling that the management-rights clause in *Provena* did not specifically address ‘attendance’ or ‘tardiness’, but that those items are clearly within the *umbrella* of ‘reporting practices and procedures’.” 2011 WL 2412622 at 12 (emphasis added). Consistent with the Board’s decision in *Provena*, ALJ Etchingham construed clear and unmistakable waiver of the employer’s unilateral implementation of a new timeclock system from the following combination of provisions, even though the contract lacked any explicit reference to timekeeping policies:

- To discipline for cause;
- To promulgate rules and regulations;

- To determine all schedules, policies, procedures and methods... including those related to training, evaluation, and attendance...; and
- To adopt rules and regulations... and to require employees to observe such rules and regulations.

*Id.* Even though the clause does not specifically mention the word “timekeeping,” the ALJ found that the term “attendance” encompassed the concept of “tardiness”; thus, the clause “specifically, precisely, and plainly grant[ed] Respondent the right to unilaterally promulgate new attendance methods. . . .” *Id.*

The Board in *Baptist Hospital of East Tennessee* construed broadly the “umbrella” of authorized unilateral employer action permitted by its management rights clause. 351 NLRB 71 (2007). The Union challenged the employer’s unilateral modification of the holiday scheduling system, which removed any deference to employee seniority and preference, and instead assigned shifts on a rotational basis. 351 NLRB at 72. Reading together the following management rights provisions, the Board construed clear and unmistakable union waiver of bargaining over the holiday scheduling policy:

- To determine and change starting times, quitting times and shifts;
- To assign employees; and
- To change methods and means by which its operations are to be carried on.

*Id.* Although the change affected benefits associated with seniority, the Board considered the policy modification to be “simply an incident of the fundamental right to schedule employees and to establish the means by which the Hospital’s operations are carried out. Indeed, *the contract language could hardly be clearer.*” *Id.* (emphasis added).

The combination of just two-management rights clause provisions in *Quebecor World Mt. Morris II, LLC* “plainly authorized” the employer to unilaterally implement a new Performance Improvement Plan (“PIP”) procedure. 353 NLRB No. 1, at \*3 (2008). When the Union agreed to the following two provisions, it clearly and unmistakably relinquished its right to bargain over the PIP procedure’s implementation:

- To demote, suspend, discipline or discharge for cause;
- To establish and apply reasonable standards of performance and rules of conduct.

*Id.* In light of *Provena*, the PIP procedure fell neatly inside the umbrella of “disciplinary procedures for work-performance issues” and its implementation constituted proper unilateral employer action. *Id.*

**3. Virginia Mason’s management rights clause is more robust and specific to the Hospital’s unilateral action than the clause that demonstrated clear and unmistakable waiver in *Provena*.**

As the ALJ correctly concluded, the Union clearly and unmistakably waived the right to bargain over changes to Virginia Mason’s Infection Control Policy when it agreed to Section 18.1 of the CBA. The Agreement endowed Virginia Mason with an expansive collection of rights, including the following:

- To require standards of performance and to maintain order and efficiency;
- To **direct** nurses;
- To **determine the** materials and **equipment to be used**;
- To **implement improved** operational methods and **procedures**;
- To **discipline**, demote or discharge nurses for just cause; and
- To **promulgate rules** and regulations.

Virginia Mason’s management rights clause is more robust and specific to the unilateral action taken than the clause found sufficient to establish clear and unmistakable waiver in *Provena*. The superior strength and scope of Virginia Mason’s management rights is apparent in the following side-by-side comparison:

Provena	Virginia Mason
To change <b>reporting practices</b> and procedures and/or to introduce new or improved ones	To determine the <b>materials and equipment to be used</b>
To make and enforce rules of conduct	To promulgate rules and regulations
To suspend, discipline, and discharge employees	To discipline, demote or discharge nurses for just cause
	To implement improved operational methods and procedures
	To require standards of performance and to maintain order and efficiency
	To direct nurses
	All matters not covered by the language of this Agreement shall be administered by the Hospital on a <i>unilateral basis</i> in accordance with such policies and procedures as it from time to time shall determine
→Clear and unmistakable waiver	→Clear and unmistakable waiver

A face mask is “equipment to be used” by registered nurses. (Tr. 141:3-7; Res. Ex. 3 at 7.2, “Personal Protective Equipment”). When the provisions of Section 18.1 are read together, the clause authorizes Virginia Mason to unilaterally create rules and improve procedures related to the nurses’ use of equipment, including face masks, and to enforce those rules and procedures with discipline. Just as the Board concluded in *Baptist Hospital of East Tennessee* -- that the holiday scheduling system was “simply an incident to” the Hospital’s right to assign shifts and manage operations – Virginia Mason’s masking policy is an incident to its

fundamental right to mandate equipment use. As the ALJ concluded, the masking option “is simply an extension of the infection control guidelines already in effect, which extension is clearly permitted under the language of the management-rights clause.” (ALJ Supplemental Decision at 6:25-27).

**4. The words “face mask” need not appear in the management rights clause to establish waiver under *Provena*.**

Contrary to the Union’s and Counsel for the General Counsel’s assertions, the Board recognized in *Provena* and in subsequent cases that a management rights clause need not refer by name to the unilaterally implemented policy to establish clear and unmistakable waiver. *Provena*, 350 NLRB at 812 n.19, citing *New York Mirror*, 151 NLRB 834, 839-40 (1965) (waiver may be established by express reference or by “necessary implication”). In *Provena*, the management rights clause did not include the words “attendance” or “tardiness,” yet it upheld the “attendance and tardiness policy.” In *East Baptist Hospital of Tennessee*, the clause did not include the words “holiday,” “scheduling,” “seniority,” or “preference,” yet it upheld the “holiday scheduling policy” that impacted benefits associated with seniority and preference. And in *Quebecor World Mt. Morris II, LLC*, the clause did not expressly refer to a “performance improvement plan,” but the Board upheld the employer’s unilateral action. The Union and Counsel for the General Counsel erroneously posit that the absence of the words “face mask” in the management rights clause should be dispositive here. (Union’s Brief in Support of Exceptions, at page 8-9; G.C. Brief in Support of Exceptions, at pages 8-9).<sup>6</sup>

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<sup>6</sup> Counsel for the General Counsel on page 8, note 14, of the Brief in Support of Exceptions appears to have omitted the word “not” while quoting the ALJ’s Supplementary Decision.

**5. The waiver issues implicated by the Incentive Pay Policy in *Provena* differ from the waiver question presented here.**

The Union conveniently bypasses the crux of the Board's implied waiver rule in *Provena* by focusing on a wholly separate issue involving incentive pay in Part A of the decision, which implicated different waiver issues. (Union's Brief in Support of Exceptions, at pages 6-9). The management rights clause in *Provena* undeniably lacked any provision related to compensation at even the most general level. 350 NLRB at 808-09. Moreover, other sections of the collective bargaining agreement defined employee wages and benefits. *Id.* at 809 n.5. In fact, the Board largely ignored the management rights clause when determining whether the union had waived its right to bargain over the incentive policy, touching upon the clause only in a footnote; rather waiver turned on whether the contract's compensation provisions encompassed incentive pay, or, alternatively, whether the parties "consciously explored" the policy in bargaining. *Id.* at 815 n.34-35. In contrast, Virginia Mason derived its right to amend the Infection Control Policy under the rule set forth in Part B of the *Provena* decision, which recognized that management rights provisions read in combination impliedly authorized unilateral action. The ALJ agreed that Part A of the *Provena* decision is irrelevant here, as the Judge omitted any reference to *Provena*'s incentive pay policy in the Supplementary Decision.

**6. Counsel for the General Counsel urges a novel four factor test that is inconsistent with Board precedent.**

Counsel for the General Counsel attempts to inject a novel framework inconsistent with the Board's decisions in *Provena*, *East Baptist Hospital of Tennessee*, and *Quebecor World Mt. Morris II, LLC*. Under the proposed test, the Board would consider: "(1) the wording of the proffered sections of the agreement at issue; (2) the parties' past practices; (3) the relevant

bargaining history; and (4) any other provisions of the collective bargaining agreement that may shed light on the parties' intent concerning bargaining over the change at issue.” (G.C. Brief in Support of Exceptions, page 7). This test appears nowhere in *Provena* or in subsequent cases decided under *Provena*.

Where the management rights provisions, taken together, specifically establish waiver of bargaining, as the ALJ concluded occurred here, the Board need not analyze the parties' past practice, bargaining history, or other provisions of the agreement. *See Provena*, 350 NLRB at 813 (inference of waiver may arise from “the language of the contract or the history of negotiations”) (emphasis added), citing *C & C Plywood Corp.*, 148 NLRB 414, 417 (1964). Here, the ALJ followed the Board's example in *Provena* by relying solely on the management rights clause to find clear and unmistakable waiver of the right to bargain. The ALJ did not err in failing to consider a four factor test that is outside the scope of *Provena* and advanced without citation to Board precedent.

In light of *Provena*, the Union specifically and unequivocally relinquished the right to bargain over rules, procedures, or discipline policies surrounding the face mask component of the Infection Control Policy when it agreed to the language in Section 18.1 of the CBA. The decision of the ALJ should be upheld on this independent basis.

**B. The CBA Contains an “Expansive” Zipper Clause and a Clause that Renders Past Practices Nonbinding.**

Any duty to bargain was also waived when the Union agreed to Section 20.4 of the Collective Bargaining Agreement:

20.4 **Complete Understanding.** The parties acknowledge that during the negotiations which resulted in this Agreement all had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity

are set forth in this Agreement. Therefore, the Hospital and the Association, for the term of this Agreement, each **voluntarily and unqualifiedly waives the right**, and each agrees that the other shall not be obligated to **bargain collectively with respect to any subject or matter not specifically discussed during negotiations or covered in this Agreement**. The parties further agree, however, that this Agreement may be amended by the mutual consent of the parties in writing at any time during its term.

(G.C. Ex. 22) (emphasis added).<sup>7</sup> Should the Board determine that the exclusive rights enumerated in the management rights clause did not authorize Virginia Mason’s unilateral action, the zipper clause in Section 20.4 read in tandem with the final provision of Section 18.1 provide alternative evidence that the Union waived bargaining.<sup>8</sup>

As the ALJ correctly concluded, Virginia Mason’s 2004 mandatory immunization policy is “significantly different” from its 2006 implementation of the face mask and antiviral medication options. (ALJ Supplemental Decision, at 7:24-26). Considering that Virginia Mason announced the revised Infection Control Policy in December 2005 and implemented the Policy in 2006, the parties could not have discussed the change during negotiations in the Fall of 2004.

**1. A highly detailed zipper clause reinforces waiver of bargaining under a comprehensive management rights clause.**

The union in *Provena* rejected a clause nearly identical to Section 20.4 of the CBA; ALJ Bruce Rosenstein described that zipper clause as “expansive” rather than generally

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<sup>7</sup> The Union and the Counsel for the General Counsel characterize differently the ALJ’s ruling with respect to the zipper clause. The Union states that the ALJ “rejected” Virginia Mason’s argument that the zipper clause provides additional evidence of the Union’s waiver of bargaining (Union Brief in Support of Exceptions, at page 5), while Counsel for the General Counsel states that the ALJ declined to rule on the issue (G.C. Brief in Support of Exceptions, at page 11).

<sup>8</sup> “All matters not covered by the language of this Agreement shall be administered by the Hospital on a *unilateral basis* in accordance with such policies and procedures as it from time to time shall determine.” (G.C. Ex. 22, Section 18.1) (emphasis added).

worded. *Provena St. Joseph Medical Center*, 2001 WL 1660701, 13-CA-39122-1 at 1 FN 4 (Dec. 21, 2001).

The Board’s decision in *EPI Corporation d/b/a Rockford Manor Intermediate Care Facility*, 279 NLRB 1170 (1986) is directly on point and controlling. In that case, it was determined that the agreement “included a highly detailed ‘zipper clause,’ article I, and an equally comprehensive management-rights clause, article IV.” Because of these clauses, it was found that “[t]here is merit in Respondent’s contention that under controlling precedent, these provisions, given their ordinary meaning, substantiate mutual intent to waive bargaining during the contract term with respect to all subjects left unregulated within the four corners of the parties’ agreement.” 279 NLRB at 1173. The “provisions” in that case are virtually identical in wording to the management rights and zipper clauses in this case. Accordingly, as in *EPI Corporation*, the Amended Complaint here should be dismissed in its entirety. See also *Carolina Carton Company*, 272 NLRB 718 (1984) (combination of a management rights clause and zipper clause established waiver of bargaining).

## 2. Past practices are nonbinding.

The Union’s agreement to Section 20.3 also substantiates the Union’s waiver of bargaining over the Infection Control Policy:

**20.3 Past Practices.** Any and all agreements, written and verbal, previously entered into between the parties hereto are mutually cancelled and superseded by this Agreement. Unless specifically provided herein to the contrary, **past practices shall not be binding on the Hospital** or the Association. The Hospital agrees that it will not make any changes in past practices that would have the effect of discriminating solely against members of the bargaining unit. The Hospital will communicate any changes in past practices to the nursing staff in advance of the change.

(Emphasis added). Section 20.3 renders any past practices relating to the use or nonuse of face mask equipment irrelevant. The Policy applies uniformly to all Virginia Mason employees and even to vendors. In concert with the management rights clause and zipper clause, the Union has clearly and unmistakably relinquished the right to bargain over Virginia Mason's Infection Control Policy.

#### IV. CONCLUSION

Face masks are commonly used equipment in health care settings to prevent the spread of infection. When the parties agreed that Virginia Mason should unilaterally implement procedures and rules governing equipment use by nurses, the Union clearly and unmistakably waived the right to bargain over the Infection Control Policy's face mask component. For the reasons expressed in this brief, the ALJ's Supplementary Decision should be upheld and the complaint should be dismissed.

DATED this 20th day of January, 2012.

Davis Wright Tremaine LLP  
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By: /s/ Mark A. Hutcheson  
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## CERTIFICATE OF SERVICE

I certify that on January 20, 2012, I caused the foregoing document to be electronically filed with the National Labor Relations Board, with a copy being sent via fax, to the following:

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DATED this 20th day of January, 2012.

/s/ Margaret C. Sinnott  
Margaret C. Sinnott